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NO. 83-850

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner

v.

JAMES CONNERS KARO, ET AL.,
Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether maintenance and monitoring of an electronic tracking device from within a zone of privacy requires a warrant for a specific and reasonable period of time.

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation whose membership is comprised of more than 2,500 lawyers who are citizens of every State and all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system, as advocates, law professors or judges of the State or federal courts.

Among NACDL's stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures. A cornerstone of this organization's objective, and of our criminal justice system, is the fundamental constitutional protection of an individual's Fourth Amendment rights, and NACDL is very concerned about any decision that would undercut or dilute this constitutional guarantee. Indeed, the position taken by the United States government in the instant case undercuts the important constitutional safeguards provided by the Fourth Amendment and conflicts with several Supreme Court and Court of Appeals decisions on the subject.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that this issue is of such importance to defense lawyers throughout the nation that NACDL should take a position and offer its assistance to the Court.

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SUMMARY OF ARGUMENT

A warrant is required to monitor a signal emitted from a beeper secreted within a zone of privacy. This Court's decision in *United States v. Knotts*, 103 S.Ct. 1081 (1983) does not compel a contrary result inasmuch as the beeper in that case was never monitored from a zone

of privacy as here but, rather, only from an automobile travelling over public thoroughfares or from a cannister sitting outside a cabin in what this Court described as an "open-field". Indeed, this Court indicated in *Knotts, supra,* that if it had been confronted with facts such as these, prior authority such as *Silverman v. United States,* 365 U.S. 505 (1964) may have compelled a different result.

Moreover, a warrant is especially necessary considering the potentially infinite duration of such beepers and the potential for Government abuse in monitoring the activities of innocent citizens to whom the non-contraband item within the beeper is secreted has been transferred.

Finally, this Court should note the ever increasing potential for Governmental abuse created by the technological onslaught of the past decade and should be especially sensitive to the Fourth Amendment values threatened thereby.

I.

MONITORING A SIGNAL EMITTED FROM A ZONE OF PRIVACY

The position propounded by the Government will truly mark the ushering in of the "Big Brother" state as envisioned by George Orwell. Specifically, the monitoring of non-contraband personal property contained within a dwelling without resort to the judicial process will allow the Government to monitor the actions of an unlimited number of persons[1] for an unlimited period of time.

1. When beepers are attached to conveyances such as airplanes, automobiles, or even drums, there exists the very realistic possibility that innocent third party purchasers will unwittingly have their every move monitored and scrutinized by the Government.

There should be little question that if an individual has a sufficient privacy interest in an area to require a warrant for entry into that area, such privacy expectation should be sufficient to require judicial scrutiny of any surreptitious monitoring of the signal emitted from within that zone of privacy. *See: Silverman v. United States,* 365 U.S. 505 (1961) [where the Supreme Court held a warrant was required to install and monitor a microphone into an adjoining wall on the grounds that same was "accomplished by means of an authorized physical penetration" constituting "an actual intrusion into a constitutionally protected area"]; *Clinton v. Virginia,* 377 U.S. 158 (1965).

This concept of monitoring from a "zone of privacy" has been recognized by a number of courts, *United States v. Knotts,* ____ U.S. ____, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983); *United States v. Cassity* (6th Cir. 1983) 720 F.2d 451; *United States v. Bailey* (6th Cir. 1980) 628 F.2d 938, at p. 944; *United States v. Moore,* (1st Cir. 1977) 562 F.2d 106, at p. 113; where personality transmits from a private area. In *United States v. Sheikh* (5th Cir. 1981) 654 F.2d 1057, the Fifth Circuit noted there was a heightened privacy concern where the Government was monitoring from a "place hidden from public view" at p. 1071. However, because the container there contained "known contraband" the Court did not reach this issue.[2]

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2. Nor is the Court confronted with this issue in the instant case. While the Courts have been reluctant to recognize a reasonable expectation of privacy in contraband, they have refused to extend this rule to substances (like ether) which are lawfully possessed but suspected of use in criminal activity. *United States v. Karo,* 710 F.2d 1433, 1436 (10th Cir. 1983); *United States v. Knotts,* 662 F.2d 515 (8th Cir. 1981) *rev'd on other grounds,* ____U.S.____, 103 S.Ct.

Furthermore, the warrant requirement for monitoring a transmission from within an area of expected privacy is underscored by the Supreme Court's decision in *Dalia v. United States,* 441 U.S. 238 (1979) where, considering the inverse proposition, the Court held that a warrant to monitor from within a constitutionally protected area presupposed the right to physically penetrate that area to install such device, indicating that the paramount concern with electronic surveillance into a protected area is its continuing nature rather than the initial intrusion.

In *United States v. Moore* (1st Cir. 1977) 562 F.2d 106, at p. 112, the First Circuit recognized that a "beeper" transforms the vehicle " . . . into a messenger in the service of those watching it and while a driver has no claim to be free from observation while driving in public, he properly can expect not to be carrying around an uninvited device that continuously signals his presence". And although the Court in *Moore* held that no warrant was required to monitor a transponder attached to the exterior of the vehicle,[3] where the transmitter being monitored is emitting its signal from within an area where one has a reasonable expectation of privacy[4] a warrant

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1081, 75 L.Ed.2d 55 (1983); *United States v. Bailey,* 628 F.2d 938, 944 (6th Cir. 1980); *United States v. Moore,* 562 F.2d 106, 111 (1st Cir. 1977).

3. The First Circuit went on "to hold while the lessened expectance of privacy associated with motor vehicles justifies the use of beepers without a warrant to track vehicles, this can be done only if the officers have probable cause at the time." *United States v. Moore,* at pp. 112-3.

4. In *Moore,* the transmitter was placed inside chemicals which were ultimately taken by the defendants into a residence, at p. 113. Similarly, in the instant case, the Government acknowledged that they needed the electronic surveillance device and a directional finder in order to keep track of the drum when it was in the sundry dwellings and lockers.

is required not only for the entry but for the continued monitoring as well. *United States v. Moore, supra,* at p. 113, *United States v. Bailey* (6th Cir. 1980) 628 F.2d 938.

Just as in *Moore,* at p. 113, where the "beepers" were secreted within the chemical containers, transmitting their presence from inside the "privacy" of a residence, the "beepers" here transmitted from within a recognized zone of privacy inside numerous private dwellings and two private lockers, telling the authorities of its whereabouts, including its removal and relocation.

When Respondents withdrew from the public view, taking the drum of chemicals inside with them, they had every right to expect that their activities inside the various houses which they sought to preserve as private would be free from warrantless governmental intrusion. Since the drum containing the beeper was not contraband or otherwise illegally possessed by Respondents:

> "the Government had no right to determine their continued presence in the house by use of warrantless electronic surveillance. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedures." *U. S. v. Moore, supra* at p. 113, (citing *Boyd v. U. S.,* 116 U.S. 616, 635 (1886)).

In a recent decision, the Fifth Circuit concluded that a beeper broadcasting from within a zone of privacy constitutes a search:

> "In a very real sense, the beeper serves as a surrogate police presence that remains within the vehicle's interior and converts the area into a covert broadcast-

> ing station. Given the capacity of such devices to impart information, the introduction of these government-controlled objects into an area in which an individual legitimately retains an expectation of privacy constitutes an offensive invasion of fourth amendment values. The government, via its electronic counterpart, remains physically present . . . from the moment its agents enter until the tracking devices cease to function. In this age of electronic wizardry, it is not too much to suppose that beepers soon will have virtually unlimited lifespans. The continuing intrusion of such a device into a privacy-cloaked area, an intrusion that could potentially last from here to eternity, mandates protection. . . ."
> *United States v. Butts* (5th Cir. 1983) 710 F.2d 1139, 1149 (rehearing *en banc* granted).

See also, United States v. Cassity (6th Cir. 1983) 720 F.2d 451 (Pet. for Cert. pending, No. 83-1393) [whether beeper monitoring in a private home is characterized as a search or seizure is unimportant. (citation omitted). What is important is that it entails governmental intrusion into an area where privacy can be expected].

UNITED STATES V. KNOTTS DOES NOT COMPEL CONTRARY RESULT

United States v. Knotts, ____U.S.____, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983) does not compel a contrary result inasmuch as that case is distinguishable in that the Supreme Court in *Knotts* was not confronted with the issue of monitoring a beeper signal emitted from a "zone of privacy":

> "Respondent Knotts, as owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within dwelling place insofar as the cabin was con-

> cerned. . . . But no such expectation of privacy extended to the visual observation of Petschen's automobile arriving on his premises after leaving a public highway; nor to movements of objects such as the drum of chloroform *outside the cabin in the 'open fields'*. [citation omitted]." (emphasis supplied) *United States v. Knotts*, ____U.S.____, 103 S.Ct. 1081, 75 L.Ed.2d 55, at p. 62 (1983).

Indeed, two Justices in *Knotts* indicated that if the Court had been considering a case of beeper monitoring from within a zone of privacy, the Fourth Amendment may have compelled a different result.

> "Cases such as *Silverman v. United States*, 365 U.S. 505, 509, 512 (1964), however, hold that when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means." *United States v. Knotts*, ____U.S.____, 75 L.Ed.2d 55, at p. 65 (1983) (Justice Brennan joined by Justice Marshall *concurring in judgment*).

In discussing the impact of the *Knotts* decision, the Court of Appeals delineated the critical distinctions between the instant case and *Knotts*:

> "In the case before us the beeper was monitored while the can was within private residences and storage lockers. The beeper gave law enforcement officials information that could not be discovered by ordinary visual surveillance, even had that surveillance been constant. The *Knotts* case involved surveillance over only a few days; monitoring in the instant case took place over five months. In *Knotts*, the drum was never inside a residence; here the ether was inside four residences. In *Knotts* the offi-

> cers lost track of the automobile carrying the drum once on the public highway; here the officers lost track of the ether can for significant periods of time, after the ether had come to rest in residences and a rented locker. In the instant case, most of the tracing to new locations was possible only by use of the direction finder to locate the beeper.
>
> The monitoring of the beeper in the instant case was a different type of intrusion than that in *Knotts*, touching upon privacy interests that historically have been protected by the Fourth Amendment. We hold that the warrantless use of a beeper to monitor the location of noncontraband withdrawn from public view inside private residences or similarly protected places is an unconstitutional search or seizure." *U.S. v. Karo, supra,* at p. 1439.

Knotts does not stand for the proposition that monitoring of a beeper is permissible regardless of the circumstances of its use. *Knotts* does not authorize the Government to penetrate the sanctity of a private dwelling:

> "As we have noted, nothing in this record indicates that the beeper signal was received or relied upon after it had indicated that the drum containing the chloroform had ended its automobile journey at rest on respondent's premises in rural Wisconsin. Admittedly, because of the failure of the visual surveillance, the beeper enabled law enforcement officials in this case to ascertain the ultimate resting place of the chloroform when they would not have been able to do so had they relied solely on their naked eyes. But scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise. A police car following Petschen at a distance throughout his journey could have observed him leaving the public highway and arriving at the cabin owned by respondent, with the drum of chloroform still in the car. This fact,

> along with others, was used by the government in obtaining a search warrant which led to the discovery of the clandestine drug laboratory. But there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin, or in any way that would not have been visible to the naked eye from outside the cabin."
> *United States v. Knotts, supra,* at p. 64.

In *Knotts,* the Court held that monitoring did not invade any legitimate expectation of privacy and therefore there was neither a search nor a seizure. In reaching this conclusion, the majority of this Court relied on the "automobile exception", and the "open fields doctrine" to validate the electronic tracking. Central to both concepts is the notion that there exists a diminished expectation of privacy in those items subject to public inspection and scrutiny. Here, the governmental activity complained of is the warrantless monitoring of non-contraband personal property located in an area cloaked with a legitimate expectation of privacy, and nothing in the *Knotts* decision or this Court's previous treatment of search and seizure cases compels the reversal of the trial court or the Court of Appeals' ruling.

II.

DURATION OF TRACKING DEVICE MUST BE LIMITED

The continual presence of a beeper within a zone of privacy must be subjected to judicial scrutiny[5] so as to

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5. *See U.S. v. Kupper,* 693 F.2d at 1132 n.2 1134 (noting that magistrate's order authorizing beeper installation "was limited in duration"); *U.S. v. Parks,* 684 F.2d at 1085 (characterizing beeper's presence in aircraft interior as "continuing physical intrusion or trespass"); *United States v. Brock* (9th Cir. 1982) 687 F.2d 1311,

assure citizens that the duration of the beeper's life will not be *ad infinitum* or unreasonable.[6]

> "We reiterate our belief that the invasion of protected privacy caused by beeper extends far beyond the initial entry required to affix the tracking device; indeed, the intrusion endures for the life of the beeper. See *Berger v. New York*, 388 U.S. 41, 59, 87 S.Ct. 1873, 1883, 18 L.Ed.2d 1040 (1967) (prolonged period of electronic surveillance equivalent to 'series of intrusions, searches, and seizures'). We are gravely disturbed by the prospect that such intrusions may continue *ad infinitum*, a concern echoed in the opinion of this and other circuits. The surest way to guarantee that such an intrusion does not exceed reasonable bounds is to require judicial supervision of the initial installation and continued maintenance of a tracking device when it is secreted within [a zone of privacy]."
> *United States v. Butts, supra*, at p. 1150.

ABUSE OF BEEPER USE

In *Knotts*, this Court spoke of the potential abuse of beepers:

1322. ("[T]he [c]ourt cannot countenance the potentially unlimited duration of this type of surveillance '[location beepers]' ") (quoting with approval *United States v. Cofer* (W.D. Tex. 1978) 444 F.Supp. 146, 149-150; *Bailey*, 628 F.2d at 945 & n.12 (due to absence of termination date in authorizing warrant, beeper's presence could have continued "ad infinitum"); *United States v. Curtis* (9th Cir. 1977) 562 F.2d 1153, 1156 (expressing need for reasonable time limitations and other reasonable restrictions on beeper use); *United States v. Moore*, 562 F.2d 106, 113 n.4 (noting that duration of beeper use was limited and cautioning that additional safeguards might be required for expensive periods of beeper installation).

6. Judicial intervention is necessary since the courts have recognized that well-intentioned but over-zealous officers are often "engaged in the competitive enterprise of ferretting out crime." *Johnson v. United States*, 333 U.S. 10 (1948), and must resort to neutral and detached magistrate's for a determination of the reasonableness (i.e. probable cause) of their actions.

> "Respondent expresses the generalized view that the result of the holding sought by the government would be that 'twenty-four hour surveillance of any citizen of this country will be possible, without judicial knowledge or supervision.' *Br. for Resp. at* 9 (footnote omitted). But the fact is that the 'reality hardly suggest abuse,' *Zurcher v. Stanford Daily*, 436 U.S. 547, 566, 56 L.Ed.2d 525, 98 S.Ct. 1970 (1978); if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles be applicable." *United States v. Knotts*, ____U.S.____, 75 L.Ed.2d 55, 63.

The reality of the instant case suggests the very abuse envisioned by Respondent Knotts. Here, the Government kept the drum of ether under 24 hour surveillance for a period of almost five (5) months.[7] Here, the Government's conduct evinces the "dragnet type law enforcement" that Respondent Knotts complained of. *Supra*, at p. 63. Accordingly, this Court must now "determine whether different constitutional principles may be applicable" and in light of the facts in this case, must address the issue expressly left unresolved in *Knotts*:

> whether the Fourth Amendment protects against unlimited warrantless monitoring from a zone of privacy.

The Government relies on the decision in *United States v. Brock* (9th Cir. 1982) 667 F.2d 1311 to support the proposition that the minimal intrusion occasioned by the use of the beeper installed in a non-contraband item taken into a private residence was not a search. What the

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7. When the agents lost contact with the transponder, a directional locator was employed to determine the new situs of the beeper.

Government fails to point out is that the ruling in *Brock* was limited:

> "The principle upon which our holding rests is not without limits. Were the beeper to relate more information than simply location, its resemblance to the wiretap in *Katz* would increase. *At some point the duration of the monitoring would require the use of the particular sense-enhancement device to be characterized as a search. See United States v. Dubrofsky,* 581 F.2d at 211-12. It is important to note that the beeper in this case was monitored for only two days before a search warrant was sought. We note with approval the statement in *United States v. Cofer,* 444 F.Supp. 146 (W.D. Tex. 1978), addressing the question of continued beeper surveillance of unlimited duration:
>
> > [T]he [c]ourt cannot countenance the potentially unlimited duration of this type of surveillance [location beepers]. Citizens have a right to think that the government will not track them for months on end by resort to the latest electronic gadgetry.
>
> 444 F.Supp. at 149-50 (quoted with approval in *United States v. Allen,* 633 F.2d at 1289 n.5)." *United States v. Brock, supra,* at p. 1322 (emphasis supplied).

The Government also fails to address the omnipresent question of the duration of the tracking device. Petitioner seeks unlimited authority and discretion as to the time, place, and manner of monitoring. Analogizing the situation to the issuance of general warrants, the Court stated in *United States v. Cady* that such limitless action would not be tolerated:

> "It is too familiar to require citation that resistance to general warrants, unrestrained as to persons, times,

> or places, supplied much of the incentive for its [Fourth Amendment] adoption. Did we contemplate in this case an authorization, unlimited as to every one of these factors—time—or of such duration as to be unlimited as a practical matter, we might well . . . declare any action taken pursuant to it invalid." *U.S. v. Cady* (5th Cir. 1981) 651 F.2d 290.

It is the source of information obtained by the continued intrusion, potentially of unlimited duration, that violates the Respondent's expectation of privacy. The beeper conveys (forever) to the law enforcement personnel the location and direction of the targeted cannister. It further conveys that one or more individuals are moving same. Presuming that the Respondent sought to keep the location of the non-contraband goods a secret,[8] just as Mr. Katz[9] sought to keep his conversation confidential, the Government has made the Respondent's chattel an involuntary honing device:

> "The government, without Michael's consent or knowledge, made him into a broadcaster of the details of his own affairs. The listener is the government. The signals are simple. But they are damning. This is far from minimal. It strikes at the heart of the protection that the Fourth Amendment affords to the person and his affairs and effects in the relationship between him and his sovereign. This significant intrusion into Michael's affairs cannot be justified on the ground that the electronic device was attached to his automobile and the privacy interest in an automobile is not strong." *United States v. Michael, supra,* at pp. 271-2.

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8. The beeper potentially creates a constitutional impediment or an individual's right to travel, *Edwards v. California,* 314 U.S. 160 (1941); *United States v. Guest,* 383 U.S. 745 (1960).

9. *U.S. v. Katz* 389 U.S. 347 (1967).

Continued monitoring and maintenance must be subjected to periodic judicial review so as to assure that the probable cause giving right to the initial intrusion warrants a continued invasion.[10] To hold otherwise would allow these electronic devices to remain for months, or even years[11] on end, allowing monitoring of a long series of unwilling, innocent purchasers who may have acquired title.[12]

Surveillance pursuant to any such warrant should terminate "upon attainment of the authorized objective *or upon expiration of the warrant*" specifying a reasonable time limitation upon monitoring (emphasis added). Fishman, *Wiretapping and Eavesdropping* (1978); § 150, at pp. 201-2; 18 U.S.C. § 2518(5). This is because monitoring of electronic surveillance of any type "is the equivalent of a series of intrusions, searches and seizures", and accordingly, the monitoring must be reasonably limited in time to insure that the facts warranting the initial intrusion are not too remote. As the Court in *United States v. Cofer, supra,* noted in establishing a 30-day limit upon monitoring an aircraft "beeper":

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10. 18 U.S.C. § 2518 is a good example of where the Court requires additional probable cause to extend the monitoring.

11. Transponders, unlike beepers placed on the exterior of vehicles or cannisters have an unlimited duration since it feeds directly off the battery of the vehicle. The other beepers have a battery which may expire after several weeks or as in this case, months.

12. "The consent of one owner to have a beeper installed cannot suffice to continue the installation once the item belongs to someone else any more than the consent of a previous owner of a suitcase could suffice to permit the police to periodically open and search the suitcase after it comes under the ownership of another. Therefore, we hold that before the government agents could transfer the can of ether containing a beeper to Karo, they had to obtain an authorizing warrant." *United States v. Karo, supra,* at pp. 1438-9.

> "Citizens have a right to think that the government will not track them for months on end by resort to the latest electronic gadgetry." *United States v. Cofer, supra,* at p. 199.

In *United States v. Cofer, supra,* the Court established a thirty (30) day maximum period of duration for monitoring "beepers", applying the same standard as Title III of the Omnibus Crime Control Act.

> This Court is of the opinion that such a warrant should be issued for only a 30-day period, subject to the possibility of renewal at the end of that time if the circumstances warrant it. . . . 18 U.S.C. § 2518(5)." *United States v. Cofer* (W.D. Tex. 1978) 444 F. Supp. 146, at p. 150.

III.

POLICY CONSIDERATIONS

In deciding the critical issues presented herein, this Court must balance the conflicting interests of a citizen's expectation of privacy regarding non-contraband chattel maintained within his home, an area which has traditionally epitomized the concept of "zone of privacy", with the competing interests of law enforcement. And in determining whether law enforcement interests do indeed outweigh the Fourth Amendment interests occasioned by monitoring a beeper so situated without prior judicial authorization this Court ought to consider the various decisions of other courts in this troublesome area of Fourth Amendment jurisprudence as well as the impact this Court's ruling will have in the future.

CITIZENS HAVE A RIGHT TO ENJOY GOODS WITHOUT UNINVITED MONITORING

The Court below and at least one other Court have recognized a citizen's right to enjoyment of chattels without uninvited monitoring. *United States v. Karo*, 710 F.2d 1433, 1438 (10th Cir. 1983); *United States v. Lewis*, 621 F.2d 1382 (5th Cir. 1980). In the instant case, the Circuit Court, echoing the reasoning of *Lewis, supra*, wrote:

> All individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor the location of the objects at all times and in every place that the objects are taken. . . ." *United States v. Karo*, 710 F.2d 1433, 1438 (10th Cir. 1983).

Similarly, in a dissenting opinion in *United States v. Michael*, members of the Fifth Circuit Court of Appeals noted that:

> "The owner of a proprietary or possessory interest in private property is constitutionally entitled to expect that executive agents of government will not trespass upon his property without authorization and will not, by continuing to trespass, use his property to maintain electronic surveillance upon his movements." *United States v. Michael, supra*, at p. 265 (dissenting opinion).

Thus, ridiculously stated, and for dramatic effect, the question presented is whether or not the Fourth Amendment permits the DEA's most extraordinary Special Agent, who not only can neither see, hear or speak, but who

is also light of foot and completely inconspicuous to enter one's home without prior judicial authorization transmitting nothing more to his fellow agents than that he is "there", say by flashing venetion blinds or perhaps beeping if he is. Certainly, this Court would not permit such surveillance without prior judicial authorization, however limited or narrow the information conveyed. Thus, the degree of intrusiveness cannot be the criterion for determining whether or not Fourth Amendment protections are implicated. It must be that the Fourth Amendment protects "zones of privacy", any area in which a citizen entertains a reasonable expectation of privacy from governmental intrusions, however subtle and inoffensive. Insofar as beepers are concerned the inquiry ought not to focus on the information conveyed, but, rather, *from* what and *about* what area or zone such information is *transmitted*. And in this respect monitoring a beeper secreted in a non-contraband good being stored within what is indisputably a "zone of privacy" is no different than the situation described above concerning the DEA's extraordinary agent.

TECHNOLOGICAL ADVANCES HEIGHTEN NEED FOR FOURTH AMENDMENT PROTECTIONS

Furthermore, as the facts of this case illustrate, this decade has marked the beginning of extraordinary technological advances which will undoubtedly change the course of investigative practices and policies and to which the Fourth Amendment protections must be applied. Here, the government utilized not only a beeper but also a closed circuit video camera and an entry tone alarm. Such resort to the latest electronic wizardry is what prompted a panel of the Fifth Circuit Court of Appeals

to state, in its now vacated opinion in *United States v. Butts, supra*:

> "The high technology, electronic age in which we live highlights and exacerbates the historical tension between liberty and order. In this opinion we have attempted to bestow upon the right to privacy the dignity and primacy that it deserves, while cautioning governmental authorities that obedience to the law is essential lest respect for the law diminish to a point of nonexistence. To permit the government to invade the constitutional rights of its citizens is too high a price to pay for law enforcement. Certainly law enforcement officers must have powers and authorities, but we must be parsimonious and niggardly in opening up the private elements of our lives in the name of catching a marijuana salesman or two. We must be careful not to mutilate the Fourth Amendment bit by bit and piece by piece, until it is relegated to a position of near obscurity." *United States v. Butts, supra,* at pp. 1152-53.

Clearly, law enforcement has responded to the technological onslaught by efficiently utilizing and implementing surveillance devices unimaginable twenty years ago. The Government today can much more efficiently and surreptitiously invade that which individuals both legitimately and illegitimately seek to preserve as private. It can, completely without detection, electronically, very neatly and discretely "appear" in any man's home, automobile or can of "Prince Albert" conveying to human personnel perhaps whole conversations or mere singular, but private facts, such as physical presence.

Certainly, the Constitution's framers could not have envisioned such fantastic possibilities. But if they could have, can one even wonder that they would have been

even more convinced of its necessity, perhaps, denoting it the First Amendment? As the Government more and more rapidly approaches Orwell's horrible Big Brother in surveillance potential, however noble their current motivations, this Court must insist that the detached judiciary and not necessarily biased and ulteriorly motivated law enforcement officers decide when and for how long incredible and marvelous devices such as beepers secreted in seemingly innocuous containers which may ultimately be transported from one home to another may be resorted to.

CONCLUSION

The use of tracking devices has generated a great deal of litigation and commentary,[13] since traditional Fourth Amendment values and protections are pitted against the rapidly moving electronic age. The honing device in this case was surreptitiously implanted in the private (non-contraband) property of the respondents in order to enhance the agents' ability to shadow the property and its possessors.

The central inquiry in this case is the same as that raised in *United States v. Knotts, supra, Smith v. Maryland,* 442 U.S. 735 (1979), *Dalia v. United States,* 441

13. *See Note,* Tracking Katz; Beepers, Privacy, and the Fourth Amendment, 86 Yale L.J. 1461 (1977); *Carr,* Electronic Beepers, 4 Search & Seizure L. Rep. No. 4 (1977); Dowling, "Bumper Beepers" and the Fourth Amendment, 13 Crim. L. Bull. 266 (1977); Marks & Batey, Electronic Tracking Devices: Fourth Amendment Problems and Solutions, 67 Ky. L. J. 987 (1978); Note, Electronic Tracing Devices & Privacy: See No Evil, Hear No Evil, But Beware of Trojan Horses, 9 Loy. U. Chi. L. J. 227 (1977); Note, Finders Keepers, Beepers Weepers: *United States v. Knotts*—A Realistic Approach to Beeper Use and the Fourth Amendment, 27 St. Louis U. L. J. 483 (1983); Annot., 57 A.L.R. Fed. 646 (1980).

U.S. 238 (1979) and *Katz v. United States*, 389 U.S. 347 (1967): whether the government intruded into an area where privacy can most legitimately be expected. Clearly, the uninvited and warrantless intrusion into four separate homes and two private lockers over a period of five months constitutes a series of continuing searches. The Government must be rebuffed in its attempt to legitimize the warrantless penetration of the last bastion of unfetterred privacy: a person's dwelling.

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